MIKE McGRATH
Montana Attorney General
JENNIFER ANDERS
ANTHONY JOHNSTONE
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

COUNSEL FOR DEFENDANTS

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

ROBERT BAXTER, STEVEN STOELB, STEPHEN SPECKART, M.D., C. PAUL LOEHNEN, M.D., LAR AUTIO, M.D., GEORGE RISI, JR., M.D., and COMPASSION & CHOICES, Plaintiffs, v. STATE OF MONTANA and MIKE McGRATH, Defendants.	Cause No. ADV 2007-787 **STATE DEFENDANTS' REPLY BRIEF**

INTRODUCTION

In their final brief, Plaintiffs portray this lawsuit as one involving big questions posed by ethicists and commentators, instead of the smaller but necessary questions the State has raised concerning the specific statutes and applicable case law. (Pls.' Reply at 1.) They discuss "[t]he

highly publicized cases of Karen Ann Quinlan, Nancy Cruzan, and Terry Schiavo," but say little or nothing about the medical cases and palliative care of Robert Baxter and Steven Stoelb, the two men in the caption. Like the patients of the Physician Plaintiffs, their doctors are absent, still. Id. at 2.

Plaintiffs continue to deal in undefined abstractions like "how one will cross the threshold to death" instead of explaining in detail why physicians must intend to cause a patient's death in order to relieve suffering or promote dignity at the end of life. (Pls.' Reply at 3.) Plaintiffs' basic failure to move past these platitudes and into a tractable definition of "aid in dying" confirms the true breadth of their claim: a dying process altogether "free from government control," ending in a patient dead and a physician immune from prosecution. (Pls.' Reply at 1.) There is no precedent for such a right.

Ultimately, the key question for the Court to answer is not, as Plaintiffs contend, whether government should make decisions for individuals by prohibiting aid in dying. (Pls.' Reply at 2.) Rather, this case poses a more ordinary set of questions grounded in the facts, the law, and traditional constitutional analysis: who, specifically, is in the protected class; what, specifically, is the conduct at issue; where, specifically, is the right grounded in law; when, specifically, can the State's interest ever trump the right at issue; how, specifically, is the right to be vindicated "as applied?" Plaintiffs' final brief does little to resolve those questions, and thereby fails to show that "there is no genuine issue as to any material fact and that the [claimant] is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c).

MATERIAL FACTS

The State sought answers to key factual questions through discovery and from the expertise of Dr. Thomas Caughlan by affidavit. As framed in the background section of the State's opening brief, these answers did not appear to present genuine issues of material fact. However, throughout Plaintiffs' final brief, they make repeated assertions and characterizations of fact that appear to contradict the record on affidavits. These "mere allegations or denials" contained in the Plaintiffs' response are insufficient to defeat the State's motion for summary judgment. (Unless, that is, the Court finds that the State's affidavits factually disputed Plaintiffs' original affidavits, in which case the proper disposition is denial of both motions and further development of the record, see Western Energy v. Genie Land, 195 Mont. 202, 211, 635 P.2d 1297, 1306 (1981)).

For example, Plaintiffs assert that Montana's homicide statutes have " resulted in unnecessary suffering for a number of [Plaintiff Physicians'] patients and will continue to do so in the future until the law has been clarified." (Pls.' Reply at 9, 11.) In support, they cite a position statement from the American Pain Society, without any showing of its relevance to Montana law or the Montana experience. (Pls.' Reply at 9). Plaintiffs rely on other nonlegal authority for their new and unattested factual assertion that palliative care is often inadequate or ineffective (Pls.' Reply at 14, 15), without addressing the particular Patient Plaintiffs involved here, or Dr. Caughlan's affidavit stating that Patient Plaintiffs' conditions are susceptible to palliative care for the potential suffering they may encounter at the end of life. (Caughlan Aff. ¶¶ 9, 14.)

Through these unsupported allegations, Plaintiffs appear to suggest that traditional palliative care as understood by both parties falls short of the dignity to which Montana citizens

are entitled at the end of life. In other words--physician assisted suicide is the only means of ensuring a dignified death. This effort is most apparent in Plaintiffs' policy-laden discussion of the "nature and relationship between aid in dying and palliative care" (Pls.' Reply at 14-18), which either is an attempt to create a factual dispute through unsworn experts, or shows why this argument is best presented to a jury as an affirmative defense in the context of an actual criminal prosecution. It does not demonstrate why Plaintiffs are entitled to judgment as a matter of law. More significantly, these detailed factual and expert controversies show that this is fundamentally a policy dispute, not a constitutional dispute, and should be resolved in the legislature where all interested parties can be heard.

For clarity's sake, the State submits a list of undisputed material facts from the affidavits and formal discovery documents, which is attached hereto. These undisputed facts demonstrate that the issues before the Court are capable of resolution without further inquiry, and that Plaintiffs have failed to meet their burden of showing they are entitled to judgment as a matter of law.

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED A FUNDAMENTAL RIGHT.

Plaintiffs assert that the homicide statutes are presumptively unconstitutional because they infringe on constitutional rights. But the burden lies with Plaintiffs to prove, in the first instance, that a constitutional right is implicated and that the statute in question infringes upon that right. Montana Envtl. Info. Ctr. v. Department of Envtl. Quality, 1999 MT 248, ¶ 56, 296 Mont. 207, 988 P.2d 1236, citing Butte Community Union v. Lewis, 219 Mont. 426, 430,

912 P.2d 1309, 1311 (1986). Without that initial showing, the Court must presume the constitutionality of Montana's homicide statutes.

A proper constitutional analysis begins with defining the scope of the right. Washington, et al. v. Glucksberg, et al., 521 U.S. 702, 724 (1997). While Plaintiffs identify a euphemized right to choose "aid in dying," precise constitutional analysis demands more candor: a right to commit suicide with third party assistance. Plaintiffs presumably object to the term "assisted suicide" because they understand there is no such protected right under the Montana Constitution. For this reason, they assert only the right of mentally competent, terminally ill persons to make the choice to hasten an inevitable death by the use of lethal quantities of physician-prescribed medications. They attempt to disguise the true nature of the procedure by emphasizing that the patient may or may not actually consume the medication. But the temporal proximity of the physician's assistance and the patient's suicide is irrelevant to the threshold question of whether the Montana Constitution encompasses such a right.

Even if the right at issue is defined as the right to make private choices and die with dignity, Plaintiffs bear the burden of proving that the State's rule prevents them from obtaining the *only* means of relieving pain and suffering at the end of life. Plaintiffs cannot meet this burden because palliative care, even potentially lethal palliative care, is legally available. As long as the homicide statutes do not foreclose that option, the Constitution does not require this Court to weigh which medical procedures afford more dignity than others. Plaintiffs cannot show any infringement of the right because the homicide statutes do not force a dying person to undergo severe pain or suffering at the end of life, and do not prevent doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves may kill. Their burden of proving the statute unconstitutional is not met.

II. PLAINTIFFS DO MEET THE REQUIREMENTS FOR STANDING.

The Declaratory Judgment Act itself does not waive the traditional rules of standing. See Doty v. Montana Comm'r of Political Practices, 2007 MT 341, ¶ 23, 340 Mont. 276, 173 P.3d 700 (affirming the district court's dismissal of a declaratory judgment action on the basis of standing). Here, Plaintiffs have not joined all individuals who have or claim an interest which would be affected by the declaration as required by Mont. Code Ann. § 27-8-301. Given the undisputed fact that a majority of individuals will either qualify as a "terminally ill adult patient" at some time in their lives, or will know someone who does, Plaintiffs' obligation is substantial. This proves the State's point that there is no way for the Court to resolve the broad "as applied" challenge without sending shock waves through the medical community, and all those vulnerable groups who currently are protected by the deterrence of physician assisted suicide. At a minimum, the Court should be asking "Where are the Physician Plaintiffs' patients?" The Patient Plaintiffs' physicians are similarly unheard, not to mention family members who may be affected by such a grave decision.

Plaintiff Physicians are not proper representatives because the carefully crafted standing requirements of Armstrong v. State, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, are not met. Armstrong involved a very specific and generally legal procedure defined by statute (physician assistants performing abortions), where the Court knew exactly what it was allowing, for who, and what was still prohibited. This case is not so defined. Despite the false specificity of "aid in dying" as described by Plaintiffs, their proposal is essentially a blank check for all physicians (regardless of specialty) to provide, and all patients (regardless of illness, condition or disease) to receive, assisted suicide. A tailored judicial declaration is virtually impossible, because the

homicide statutes are not specifically aimed at this group of citizens or doctors, as was the case in Armstrong and Gryczan v. State, 283 Mont. 433, 942 P.2d 112 (1997).

Under Armstrong, physicians have standing to litigate the constitutional rights of their patients if a statute directly interdicts the normal functioning of the physician-patient relationship by criminalizing certain procedures. Plaintiffs have failed to allege, let alone prove, that assisting suicide is part of the "normal functioning" of the physician-patient relationship. Moreover, there is no allegation that these Physician Plaintiffs have any relationship at all with Patient Plaintiffs, or that Patient Plaintiffs will even be the recipients of a lethal prescription written by these doctors. There is simply no connection here between the persons claiming the right (Patient Plaintiffs) and the persons who want exemption from the homicide laws (Physician Plaintiffs), which raises serious questions about standing in an as-applied challenge. The Court should ask: physician-assisted suicide as applied to whom? Plaintiffs answer appears to be: "As applied to almost anyone we want, as though 'aid in dying' is in the eye of the beholder."

Plaintiffs chastise the State for its unwillingness to concede the issue of standing, or its reluctance to "settle" this case. (Pls.' Reply at 9-10). This case has not settled precisely because Plaintiffs insist on meeting the elements of homicide (purposely or knowingly causing the death of another), rather than simply palliating end-of-life suffering (where the principle of double effect is at play). As long as Plaintiffs intend to make death a self-determined event, as opposed to a natural process whereby the physician's goal is to promote dignity and relieve suffering, rather than ending life, the State cannot ignore its prosecutorial function or the policy of Montana that intentional killing is a crime.

As a final ploy, Plaintiffs declare that the Court's proper role is to make constitutional pronouncements so that the Legislature may then "fill in the blanks." (Pls. Reply at 11-12.) None of the case law examples cited by Plaintiffs contemplate that degree of judicial activism.

The school funding case involved a constitutional mandate to the Legislature, which the Supreme Court found appropriate for judicial review only *after* the Legislature took action, and for the limited purpose of ensuring that the enactment fulfilled the Legislature's constitutional responsibility. Columbia Falls Elem. Sch. Dist. No. 6 v. State of Montana, 2005 MT 69, ¶ 17, 326 Mont. 304, 109 P.3d 257. Importantly, the Court left it to the Legislature to define the express constitutional term: "a basic system of free quality public schools." Id. ¶ 14. Even if the right to "death with dignity" were similarly specified in the Constitution, the legislature has defined it by drawing a bright line between homicide and withdrawal of life support. See Mont. Code Ann. tit. 50, ch. 9, pt. 1 (Montana Rights of the Terminally Ill Act).

The other examples (for which no case citations are provided) involve judicial review of constitutional limits on specific government activity, see, e.g. State v. Boyer, 2002 Mont. 33, 308 Mont. 276, 42 P.3d 771 (involving game warden's act of stepping onto boat to inspect fish in live well), or specific statutes alleged to violate specific constitutional guarantees, see e.g., MEIC v. MDEQ, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (involving a blanket exception from environmental review for certain discharges containing pollutants).

None of these cases purport to authorize judicial policy-making in the guise of protecting constitutional rights, nor do they authorize courts to force the Legislature's hand on the basis of constitutional proclamation. Plaintiffs are not asking the Court to tweak the school funding formula, to weigh the environmental implications of carcinogens in public waterways, or delimit the activity of fish and game wardens. They are asking the Court to write on a blank slate and

enjoin the State from investigating and prosecuting a death where the doctor maintains that the patient consented. That is traditionally the role of the legislature. Plaintiffs' citation to the Oregon Death with Dignity Act proves the point, as it arose from the ballot box, not the gavel. Even legal scholars advocating for PAS understand that the proper forum for this debate is in the Legislature. See The Last Best Place to Die: Physician Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy, Fisk, S., 59 Mont. L. Rev. 301, 335-36 (1998).

III. PRIVACY

Privacy--the right to be left alone--is the backbone of Plaintiffs' complaint. Yet rather than seeking solitude, Plaintiffs propose active medical intervention intended to cause death, and a corresponding ban on government regulation of that activity. If this conduct is cloaked by privacy, any number of illegal activities (incest, drug use, animal cruelty, prostitution, etc.) would be similarly off limits to the State's police powers as long as the conduct involves consenting adults. None of privacy cases stand for the proposition that the right functions as a sword against generally applicable government regulation, as opposed to shield against unreasonable government intrusion. Insofar as Plaintiffs' asserted right to privacy involves only a moral judgment, it suffers a similar fate, because if a moral judgment against intentional killing cannot survive constitutional scrutiny, neither can any other conduct involving personal choice.

The State's interest in this case has nothing to do with vindicating a "specific moral view," as Plaintiffs suggest. (Pls.' Reply at 2.) Certainly no one can seriously dispute the State's moral obligation to protect life. Even the abortion cases recognize this interest at the point the

fetus becomes viable. Planned Parenthood v. Casey, 505 U.S. 833 (1992); see also Washington v. Glucksberg, 521 U.S. 702, 725 (1997).

Plaintiffs attempt to distinguish themselves from mercy killers or others who would provide euthanasia by asserting that "aid in dying" requires self-administered medication is equally unavailing. (Pls.' Reply at 21.) Plaintiffs' requested relief does not allow this Court to make those distinctions. If this Court erects a legal barrier to prosecution of doctors who prescribe lethal doses of medication to patients for the express purpose of causing death, that same barrier forecloses prosecution of doctors like Bischoff or Kevorkian who inject their patients or use other means intended to bring about a similar result, as long as the doctors claim consent.

Contrary to Plaintiffs' assertion, the privacy interest discussed in Gryczan is not so expansive as to include "aid in dying." The result of Gryczan was driven by the very nature of activity involved, i.e., "non-commercial, consensual adult sexual activity." Id., 283 Mont. at 450, 942 P.2d at 122. It was undisputed in Armstrong and Gryczan that both previability abortion and consensual sex were lawful in Montana except in the narrow circumstances prohibited by the statutes that were struck down. The same cannot be said of a doctor and patient discussing assisted suicide as a treatment option. Here, it is undisputed that assisted suicide is not a lawful treatment method for end-of-life care.

Two cases cited by Plaintiffs, State v. Nelson, 283 Mont. 231, 941 P.2d 441 (1997), and State v. Bilant, 307 Mont. 113, 36 P.3d 883 (2001), involved informational privacy, not personal autonomy. "Informational privacy" protects interests in "precluding the dissemination or misuse of sensitive and confidential information," while "autonomy privacy" protects interests in "making intimate personal decisions or conducting personal activities without observation,

intrusion, or interference." Nelson, 283 Mont. at 241, 941 P.2d at 448, quoting Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 654 (Cal. 1994). Even in that context, the right of privacy is not absolute, as medical records are subject to disclosure upon a showing of probable cause (which the Court equated with a compelling state interest). Nelson, 283 Mont. at 244, 941 .2d at 449.

The fact that suicide discussions are between doctor and patient or allegedly involves medical care is not determinative. Plaintiffs altogether ignore the Supreme Court's post-Armstrong decision in Wiser v. State, 2006 MT 20, 331 Mont. 28, 129 P.3d 133, which states:

> The right to privacy is a fundamental right guaranteed by the Montana Constitution. However, it does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes that right.

Wiser, ¶ 15, citing Armstrong, ¶ ¶ 29-34. Again citing Armstrong, the Court clearly defined the right to be dependent on the provision of lawful, medical care by a provider who is competent and licensed to perform the procedure. Wiser, ¶ 16. Chief Justice Gray (who surmised in Armstrong that the Courts ruling might affect physician-assisted suicide), signed the majority opinion in Wiser.

The same analysis was employed by the Supreme Court in Montana Sup. Ct. Comm'n on Unauthorized Practice v. O'Neill, 2006 MT 284, ¶ 53, 334 Mont.311, 147 P.3d 200. O'Neill claimed a privacy interest on behalf of his clients and constituents that would prevent the Commission on Unauthorized Practice from interfering in that relationship. But because O'Neill was not licensed, his services were not authorized and, therefore, no relationship was established and no privacy interest could be claimed. The Court distinguished O'Neill and his clients from the doctors and patients in Armstrong, who were licensed by the State "to perform the medical

procedures and to render the medical services implicated in the statutory scheme that was at issue in that case." O'Neill, ¶ 53. Plaintiffs ignore these key limitations on privacy to the detriment of the doctor-patient relationship itself. What patient would reasonably expect a doctor to be immunized from criminal liability for intentional acts of wrongdoing? Plaintiffs conveniently leave this question unanswered.

The Montana Supreme Court's recent decision in State v. Goetz, 2008 MT 296, ___ Mont. ___, ___P.3d ___, is not the sweeping privacy statement that Plaintiffs advocate. The Court in Goetz held that privacy requires officers to obtain a warrant prior to conducting electronic monitoring in the home (or demonstrate a recognized exception to the warrant requirement if the evidence is to be used in a criminal prosecution), thus affirming the principle that privacy rights, while important, are not absolute and must give way when a compelling state interest is involved. Moreover, Goetz's privacy analysis is grounded in express statements by Constitutional Convention delegates regarding electronic government surveillance. Id., 2008 MT 296, ¶¶ 33, 35. Conversely, there is nothing in the minutes indicating that the delegates believed that the privacy right would encompass physician-assisted suicide.

Goetz is also instructive because of the Supreme Court's citation to out-of-state authority on the privacy question, including case law from Alaska. Id., 2008 MT 296 ¶ 36. Plaintiffs claim that Alaska case law has no place in this analysis, since they have no "history or disposition toward privacy rights that comes close to matching Montana's experience." (Pls.' Reply at 28.) Goetz proves otherwise.

Plaintiffs brush off the apparently uncontroversial proposition that the State has a compelling interest in preventing intentional killing. Their assertion that those interests "pale" in comparison to the interests of terminally ill patients is absurd (Pls.' Br. at 29), and would

certainly not be well taken by the family of a clinically depressed individual (like Plaintiff Stoelb) who shops around for a doctor to assist him with suicide, or the victims' family in the Bischoff case. Rather than promoting patient autonomy, dignity, health and happiness, "aid in dying," as proposed by Plaintiffs, has the real potential to harm those very interests Plaintiffs seek to protect. (Caughlan Aff., Ex. 2 at 6-7.) Dr. Caughlan's significant concerns about the implications of "aid in dying" for end of life care in Montana remain unrefuted.

The fact that Oregon has legalized physician-assisted suicide does not resolve the State's concerns precisely because the Montana legislature has not outlined a procedure similar to Oregon's. Until our Legislature fills the gaps and defines exactly what patients qualify for the procedure, how a determination of competency and terminal illness is to be made, what drugs are appropriate, how consent is obtained, and other protections that Oregon has specifically declared, the homicide statutes serve a compelling state interest in preventing any abuses that may occur. Plaintiffs' selective reliance on unsworn hearsay (in the form of medical journal quotations) may suffice in a legislative hearing to show that "harm has failed to materialize" in Oregon (Pls.' Reply at 28), but it carries no weight in a court of law.

IV. DIGNITY

Plaintiffs present no analysis whatsoever as to why "aid in dying" as a medical procedure is compelled by the dignity clause, article II, section 4. Their only claim is that this is a "very strong candidate for the next use of the [dignity] doctrine." (Pls.' Reply at 30.) Such casual proclamations disserve the serious analysis with which the Supreme Court has defined, and correspondingly confined, the right to dignity. They do not entitle Plaintiffs to summary judgment.

It is undisputed in the record that "aid in dying" is not palliative care, and that the purpose of palliative care is to relieve suffering at the end of life (thereby preserving personal dignity). Unless dignity means something else (such as the bizarre right to be conscious at one's own death), or palliative care fails to adequately protect dignity as contemplated in article II, section 4, Plaintiffs fail to meet their burden.

Even if coupled with privacy, the dignity clause cannot expand the physician's traditional caretaking role to include "aid in dying" on the basis of this record. As proposed, "aid in dying" is homicide, not a medically recognized procedure. Plaintiffs' effort to distance themselves and "aid in dying" from homicide undercuts their entire case since, without that connection, the threat of prosecution vanishes (a standing problem), and there is no government intrusion (a constitutional problem).

Plaintiffs make no attempt to address K.G.F., 2001 MT 140, 306 Mont. 1, 29 P.3d 485. The Court's holding that dignity requires special solitude and due process for the mentally ill, something "aid in dying" would flatly deny. Plaintiffs' anticipated answer (that their request is on behalf of mentally *competent* individuals only) is unavailing because (1) it requires this Court to articulate a measure of competency so that doctors and patients are "certain" about what conduct is legal and what is not, which is a legislative function, and (2) it raises equal protection concerns that Plaintiffs never address. For example, do the mentally ill have more of a due process in their confinement than the mentally competent have in their deaths? To ask the question is to answer it.

CONCLUSION

Plaintiffs' lack of analysis reveals their true motive, which is judicially declared policy. Montana citizens deserve a more open approach, one in which all sides of the issue are fully debated and vulnerable groups are ensured adequate protection. This Court is not the proper forum.

Respectfully submitted this 22nd day of Sept., 2008.

MIKE McGRATH
Montana Attorney General
ANTHONY JOHNSTONE
JENNIFER ANDERS
Assistant Attorneys General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
JENNIFER ANDERS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing State Defendants' Reply Brief to be mailed to:

Mr. Mark S. Connell
Connell Law Firm
502 W. Spruce
P.O. Box 9108
Missoula, MT 59807-9108

Ms. Kathryn L. Tucker
c/o Compassion and Choices
P.O. Box 415
6312 SW Capitol Hwy.
Portland, OR 97201

DATED: 9-22-08